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Supreme Court of the United States

OCTOBER TERM, 1963

SERGEANT HERBERT N. CARRINGTON,
Petitioner

V.

ALAN V. RASH, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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Petitioner, SERGEANT HERBERT N. CARRINGTON, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Texas entered on April 29, 1964, in *Sergeant Herbert N. Carrington vs. Alan V. Rash, et al.* That judgment finally denied Petitioner's Original Petition for Writ of Mandamus filed originally in the Supreme Court of Texas pursuant to Article 1735 (a) of the Revised Civil Statutes of Texas. Said Petition requested that Court to issue a Writ of Mandamus ordering and commanding the Respondents (1) to determine whether or not Petitioner was a qualified

elector to vote in the Republican party primary election without taking into consideration the fact that he is a member of the United States Army and entered the military service while residing in Alabama; (2) not to refuse to recognize Petitioner as a qualified voter because he is a member of the United States Army and because he did not reside in El Paso County when he entered the military service; (3) not to prevent Petitioner from voting in said election for the reason that he is a member of the United States Army or for the reason that he resided in Alabama when he entered the service.

OPINIONS BELOW

The Supreme Court of Texas has issued an opinion in this case, a copy of which appears in Appendix A to this Petition, at page 1a. The opinion has not yet been reported. A copy of the judgment of the Supreme Court of Texas appears in Appendix B to this petition, at page 1b.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on April 29, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTION PRESENTED

In 1954, the following provision was added to Section 2 of Article VI of the Texas Constitution:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

The Supreme Court of Texas held in its decision rendered on April 29, 1964, that, by virtue of this provision, a nonresident at the time of entering the military service of the United States cannot acquire a voting residence in Texas so long as he is the military service. The question thus presented is:

> **Does the provision of the Texas Constitution which prevents persons in the military service from acquiring a voting residence in the county in which they are bona fide legal residents for all other purposes constitute such discrimination against persons in the military service as to violate the equal protection clause of the Fourteenth Amendment?**

CONSTITUTIONS INVOLVED

This case involves the last provision of Article VI, Section 2 of the Constitution of the State of Texas. Said provision is set out verbatim in the preceding paragraph. It may be found in Volume 2 of Vernon's Annotated Texas Constitution, on pages 339 and 340.

This case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*"
> (emphasis added)

STATEMENT

Preliminarily, Petitioner respectfully requests the Court to note that time is of the essence in this case. The

Texas Republican Party second primary election, which will determine the Texas Republican Party nominee for the United States Senate, is scheduled for June 6, 1964. On that date, Petitioner will have his last opportunity to vote in the 1964 Republican Party primary election. Accordingly, Petitioner has filed a motion under Rule 43 (4) to advance the hearing and disposition of this case sufficiently to enable it to be disposed of prior to June 6. In addition, Petitioner is ready to meet any schedule for briefing and oral argument that the Court may wish to set. This Petition may, if Certiorari is granted and the Court wishes, be treated as Petitioner's brief on its merits. Telegraphic notice of all these steps has been given to counsel for respondents. It is submitted that this expedited procedure is authorized by another primary election case, *Ray vs. Blair*, 343 U.S. 901 (1952), in which certiorari was granted on March 24, 1952, the case argued on March 31, 1952, and a decision announced on April 3, 1952. See 343 U.S. 154, 214.

Respondents in this proceeding are Honorable Waggoner Carr, Attorney General of Texas; Honorable Alan V. Rash, Chairman of the Republican Party Executive Committee of El Paso County, Texas; and Honorable Margaret Hockenberry, the "Presiding Judge", who by law has the duties of conducting the Republican Party primary elections in Precinct No. 16 of El Paso County, Texas.

Petitioner is a Sergeant in the United States Army. He entered the service in 1946 when he was a resident of Jefferson County, Alabama, and he has been continuously in the military service since that time.

Petitioner was born in Bessemer, Alabama, and he is now a resident of El Paso County, Texas. He is thirty-

six (36) years of age. He has resided in El Paso County since February of 1962 when he and his family decided to make El Paso their permanent home, and purchased a house at 3408 Sirius Drive. Petitioner presently lives at this address with his wife and two children. He has a son, Bruce Allen, 8 years of age, and a daughter, Debra Lynn, 6 years of age. Both children attend the public schools in El Paso County, Texas.

Petitioner has designated El Paso, Texas, as his permanent home for all purposes on his military records. He intends to reside in El Paso County, Texas, for the remainder of his life. Petitioner is now stationed at White Sands, New Mexico. He has been stationed there since prior to 1962, and at the time he selected El Paso as his home, he had the choice of living in either New Mexico or Texas. He moved to Texas simply because he liked El Paso County and wanted to live here permanently. Because Petitioner has declared El Paso County to be his home for all purposes, he cannot qualify to vote in any county or state other than El Paso County, Texas.[1]

In paragraph III of Respondent Carr's Answer to the Petition for Writ of Mandamus, said Respondent stated:

> "Respondent does not deny that Relator is a legal resident of the State of Texas or that this residence carries with it all the rights, privileges and duties of residence except the right or privilege of voting and those rights, privileges and duties which are based on a resident's being a qualified voter."

On December 17, 1963, Petitioner paid the poll tax levied for the year 1963 to the County Tax Collector of El Paso County, Texas. In exchange for such pay-

[1]It can readily be seen from the Petition for Writ of Mandamus and the Answers of the Respondents that all facts presented in this "Statement" have been admitted.

ment, Petitioner received a poll tax receipt which states on its face that it is to be used for voting in the year 1964. Thereafter, on March 18, 1964, Petitioner wrote a letter to Respondent Rash, asking whether or not Petitioner would be allowed to vote in the Republican Party primary election to be held in 1964. Respondent Rash, in his capacity as Chairman of the Republican Party Executive Committee of El Paso County, and on behalf of Respondent Hockenberry, as "Presiding Judge" of Precinct No. 16, answered by letter that:

> "Mrs. Margaret Hockenberry and I hereby refuse, and will continue to refuse to recognize Sergeant Carrington as a qualified voter. We have taken this position because he is in the United States Army and he resided outside the State of Texas at the time he entered the military service." (See Exhibit "C" of the Petition for Writ of Mandamus.)

In 1954 the following provision was added to Article VI, Section 2, Constitution of Texas:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

Prior to Petitioner's correspondence with the Respondents, Rash and Hockenberry, the Respondent Attorney General, in an opinion, had interpreted the above quoted provision of Section 2 of Article VI of the Texas Constitution in the following manner:

> ". . . This provision relates only to residents of this State; but it does relate both to persons who were residents of Texas before entering service and to persons who became residents of Texas after enter-

> ing service. If the only place at which a person may vote in this State is the County in which he resided at the time of entering service, and if at that time he did not reside in any County in Texas, it follows that he cannot vote in this State. Accordingly, it was said in an opinion S-148 that *no person who entered service as a resident of another State may acquire a voting residence in Texas while he is in service.*" (emphasis added)

Based on this opinion, Respondents Rash and Hockenberry refused to recognize Petitioner as a qualified voter.

Upon receiving the letter from Respondents Rash and Hockenberry, which is Exhibit "C" attached to the Petition for Writ of Mandamus, Petitioner filed an Original Petition for Writ of Mandamus in the Supreme Court of the State of Texas. In said Petition for Writ of Mandamus, Petitioner contended that the above quoted provision of the Texas Constitution discriminated against persons in the military service, and, therefore, violated the equal protection clause of the Fourteenth Amendment. Said contentions were presented in Petitioner's brief and upon oral argument. The Supreme Court of Texas divided on the question of whether or not the Texas Constitution violated the Fourteenth Amendment, and said Petition for Writ of Mandamus was finally denied in a seven to two decision. The majority and dissenting opinions appear in Appendix A of this Petition.

REASONS FOR GRANTING THE WRIT

This case concerns the rights of members of the Armed Forces to participate in elections. A provision of the Texas Constitution has been construed to deny servicemen who are admittedly legal residents of Texas the right to acquire a voting residence in Texas. As can

be seen from the majority and dissenting opinions attached to this Petition, servicemen who are legal residents of Texas but who acquired such residence after entering the military service, cannot vote anywhere in the United States in any election so long as they remain in the military service. Accordingly, important questions of federal constitutional law are presented which have not been, but should be, resolved by this Court.

The following statements appear in the dissenting opinion delivered in this cause in the Supreme Court of Texas:

> "Petitioner argues that a serviceman such as himself, who enters the Armed Forces in another state, and thereafter establishes his residence in Texas, is deprived of the right to become a qualified voter in any election so long as he resides in Texas and remains a member of the Armed Forces. This is so because when he acquires a new residence in Texas, he loses his voting privilege at the place where he resided when he entered service, and he cannot meet the residence requirements of Texas. Therefore, he is left without a place to vote."

The right to vote, which is being denied to persons in the military service, is the indispensable condition of all others rights guaranteed by the Constitution. This Court has often so stated, most recently in *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964): "Other rights, even the most basic, are illusory if the right to vote is undermined." In *Gray v. Sanders*, 372 U.S. 368, 375 n.7 (1963): " 'A right that a man has to give his vote . . . is a most trascendent thing, and of a high nature . . .' " (quoting Holt, L.C.J., in *Ashby v. White*, 2 Ld. Raym 938, 953 (K.B. 1702). The right to vote, moreover, includes the right not only to cast a ballot, but to have one's ballot

counted, and to have it counted just as much as any other citizen's. See *Wesberry v. Sanders*, supra, at 17; *Gray v. Sanders*, supra, at 379-80; *United States v. Classic*, 313 U.S. 299 (1941). The right extends to all phases of the political process, including participation in primary elections and nominating conventions. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, supra at 330 (1941) (Douglas, J., dissenting in part).

The majority opinion which appears in Appendix A of this Petition states:

> "The nonresident voluntarily gives up his right to vote in his original state of residence by changing his legal residence to Texas. The resident voluntarily gives up his right to vote by changing his legal residence to another county in Texas."

In connection with the above statement, it is abundantly clear that Petitioner by having changed his legal residence to Texas cannot qualify to vote in any other state because he cannot meet the residence requirements of any other State. However, there are no facts in this case which indicate that Petitioner voluntarily gave up his right to vote in his original state of residence. Under the facts of this case, since Petitioner was only 18 years of age when he entered the service, it is most likely that he never had an opportunity to acquire a voting residence in any state before moving to Texas. Indeed, if all states had the same constitutional provision as Texas, Petitioner most certainly could not have acquired a new voting residence since he entered the military service in 1946.

So far as Petitioner can ascertain, Texas is the only state in the United States which denies voting privileges to a legal resident of the state solely for the reason that

he is in the military service. Only members of the military service have been the object of such discrimination. Such discrimination is arbitrary and unfair because men and women who are members of the Armed Forces should at least have the same voting privileges as members of other professions.

As stated in the dissenting opinion attached to this Petition, it is elementary that "class legislation" is invalid where the classification is arbitrary and unreasonable. The classification must rest on real and substantial differences and must reasonably promote some proper object of public welfare or interest. (See *Lassiter v. Northampton County Bd. of El.*, 360 U.S. 45, (1959).

Under the interpretation which has been given to the last provision of Article VI, Section 2 of the Texas Constitution, such provision by prohibiting members of the military from acquiring a new voting residence while they are in the military service in Texas, defines and creates a special class within this State which, for no reason, is denied the rights and privileges which all other United States citizens possess. Apparently no argument is advanced that the class of persons created by this interpretation is not fit to be voters because they are immature, or are of unsound mind or are criminals or public charges. The only thing that can be found to distinguish them from other citizens is that they are members of the Armed Forces.

In the present case, Respondent Carr contends that the purpose of the constitutional amendment in question is to prevent a concentration of military voting strength in areas where military bases are located because such concentration might lead to "complete domination and control of local politics" by military men to the prejudice of the civilian citizens of the community. It is our position that this contention is misleading

because there is no proof that there is any such area where the military voting strength would control the local politics, because as a practical matter, many servicemen are not qualified voters in that they are either below the age of 21 years, are not bona fide residents of the State of Texas, or have failed to pay the poll tax or register for voting in a federal election. However, it is our contention that if a majority of qualified electors in a particular community happen to be members of the military service, then like any other voting majority, they are entitled to exercise complete dominion and control over local politics.

Not unlike most civilians who move to Texas, Petitioner voluntarily selected Texas to be his permanent home. Petitioner was not forced to move to Texas because of his occupation. In fact, Petitioner is stationed at White Sands, New Mexico, and lives in Texas simply because he likes the City of El Paso, Texas. If the matter of concern were that persons in the military service acquire a new residence by the order of their superiors and not by their own choice, and that merely living in one county is no proof of a desire to make it their permanent residence, the remedy would be to prescribe what acts are necessary for military personnel to prove the requisite intent to establish permanent residence, rather than to prevent the possibility of establishing residence for voting, no matter what the quantum of proof that their intended home is their newly acquired residence. To foreclose this posibility is to arbitrarily deny military personnel stationed in Texas equal protection of the laws.

As stated in the dissenting opinion attached hereto, "With present day mobility and industrialization, large groups, other than servicemen, move into various communities of this state for limited stays, and establish

voting residence. One need only look to the large shifts of civilian population to major construction areas as an illustration of this fact." Petitioner strongly contends that it is unfair and unreasonable discrimination to allow the civilian population to acquire a new voting residence in Texas but to deny such privilege to persons in the military service solely for the reason that they are in the military service. In the recent case of *Gray v. Sanders*, 327 U.S. 368, (1963), this Court said:

> " . . . there is no indication in the Constitution that homesite or *occupation* affords a permissable basis for distinguishing between qualified voters within a state . . . " (emphasis added)
>
> " . . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote — whatever their race, whatever their sex, *whatever their occupation*, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those *who meet the basic qualifications* . . . " (emphasis added)

The tendency of the law in this Country is to enfranchise, not disfranchise. We urge this Court to follow this tendency by extending equal protection of the laws to servicemen and civilians alike.

THE QUESTIONS PRESENTED ARE NOT MOOT

The argument may be advanced by Respondent Carr that the questions presented by Petitioner's Petition for

Writ of Mandamus are now moot. This argument, if advanced, is not valid. As can be seen from the record, Petitioner in the Texas Supreme Court requested an order that would permit him to vote in the Texas Republican Party primary election. The general primary election was held on May 2 of this year. Since none of the candidates seeking the Republican nomination for the United States Senate received a majority of the votes on that date, no candidate has become the nominee for such office, and it is necessary, under the election laws of Texas, that a second primary election be held on June 6, 1964. In this second primary election, the Respondents are by law compelled to perform the same duties as they were obligated to perform in that portion of the primary election which was conducted on May 2. (See V.A.T.S. Election Code, art. 13.03) Therefore, the question raised concerning Petitioner's right to vote in said election is not moot because said election has not yet been completed, and there is yet to be selected the Republican nominee for the office of the United States Senator from Texas.

Petitioner in his Petition for Writ of Mandamus referred to the primary election to be held on May 2, because when such Petition was filed, Petitioner had no way of determining whether such election would be completed on that date or on June 6. Since it is to be completed on June 6, 1964, the question presented has not become moot.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Texas in *Sergeant Herbert N. Carrington vs. Alan V. Rash, et al.* In the event that the Petition is granted, Petitioner prays that

the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to issue the Writ of Mandamus as prayed for in the Petition.

Respectfully submitted,

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